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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Petition for Declaratory Ruling Regarding)
Whether Certain CMRS Practices Violate)
the Communications Act)
_____)

WT Docket No. 00-164

SPRINT PCS COMMENTS

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SPRINT PCS COMMENTS

Sprint Spectrum L.P., d/b/a/ Sprint PCS ("Sprint PCS"), below responds to the Commission's request for comments addressing the issues raised by the Florida GTE class action lawsuit that have been referred to it under the doctrine of primary jurisdiction.¹

I. Introduction and Summary of Comments

American consumers enjoy the most affordable wireless service rates in the world. While the Consumer Price Index and prices for landline services have increased in the recent past, prices for wireless services have dropped by 30% during the last two years alone.² It is understandable that only last week the President stated that the Federal Government "must support policies that encourage [wireless] competition."³ Wireless, the President added, "is an industry whose products help people throughout the world

¹ See *Public Notice*, "Commission Seeks Comment on Petition for a Declaratory Ruling Regarding Whether Certain CMRS Practices Violate the Communications Act," WT Docket No. 00-164, DA 00-2083 (Sept. 20, 2000). See also *White v. GTE*, No. 97-1859-CIV-T-26C (M.D. Fla., filed Oct. 29, 1998) ("GTE class action").

² See Fifth Annual CMRS Report to Congress, FCC 99-289, at 4-5, 20 (Aug. 18, 2000).

³ President Clinton, Memorandum for the Heads of Executive Departments and Agencies, "Advanced Mobile Communications/Third Generation Wireless Systems," at 2 (Oct. 13, 2000).

communication better and in more places, saving time, money, and lives.”⁴ Indeed, the Council of Economic Advisors determined recently that the “*annual* consumer benefit from today’s wireless telephone services is estimated at \$53-\$111 billion.”⁵

Nevertheless, wireless carriers find themselves subjected to class action lawsuits. These lawsuits do not allege that service prices are too high or that consumers do not enjoy a vast array of choices in service providers and plans. They rather assert that certain carrier rate structures are unlawful under state law and that as a result, courts should order carriers to offer fewer rate structures — that is, require carrier rate structures to look more like each other so consumers enjoy *fewer* choices.

Congress and the Commission have already addressed the legal issues raised by the White plaintiff/petitioners. Recognizing that mobile services “by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure,”⁶ Congress amended Section 332(c) of the Communications Act “to establish a Federal regulatory framework to govern the offering of all commercial mobile services.”⁷ The Commission, consistent with all court rulings on the subject, has held that the Section 332(c)(3) prohibition on state rate regulation “bars lawsuits challenging the reasonableness or lawfulness *per se* of the rates *or rate structures* of CMRS providers.”⁸

⁴ *Id.* at 1.

⁵ Council of Economic Advisers, “The Economic Impact of Third-Generation Wireless Technology,” at 1 (Oct. 2000)(emphasis added).

⁶ H.R. Rep. No. 103-111 at 259-60 (1993).

⁷ H.R. Conf. Rep. No. 103-213, at 490 (1993). *See also id.* at 481 (“[B]ecause state regulation can be a barrier to the development of competition in this [CMRS] market, uniform national policy is necessary and in the public interest.”).

⁸ *Southwestern Bell Mobile Systems*, 14 FCC Rcd 19898, 19901 ¶ 7 (1999)(“*SBMS Order*”)(emphasis added).

This statute and this Commission ruling dispose of the rate structure claims that the White plaintiff/petitioners advance. Besides, charges or practices that win acceptance among consumers, who are free to choose among several CMRS providers, cannot be “unjust” or “unreasonable” under Section 201 of the Act.

II. As a Matter of Law, Rate Structures Set by Competitive Carriers That Win Consumer Acceptance Cannot Be Unreasonable Under Section 201(b) of the Communications Act

The White plaintiff/petitioners assert that GTE’s “practice of charging for all air-time on a Rounded Up basis is unjust and reasonable, and therefore unlawful under the provisions of 47 U.S.C. 201(b).”⁹ Despite the plaintiff/petitioners’ protestations to the contrary, the fact is that the Commission has already ruled that the practice of rounding up is not an unreasonable practice in violation of Section 201(b) of the Communications Act.

At issue is the concept of “chargeable time,” or put another way, the common industry practice of charging for certain “non-conversation” time. The White plaintiff/petitioners raise three particular practices in their FCC petition, which they collectively characterize as “rounding up”:

- “(i) [Charges] are measured from the time the ‘send’ (or other similarly named button) is pushed;
- (ii) [Charges] include time for ‘unconnected calls’ (where no one responds after a certain period of time or after a certain number of attempts within a short period of time); and

⁹ Third Amended Complaint at 8 ¶ 38. The White plaintiff/petitioners would give the FCC the impression that they are “not challeng[ing] . . . the reasonableness, per se, of rounding up” and are “merely challenging only [GTE’s] deceptive practice of nondisclosure.” FCC Declaratory Ruling Petition at 4 and 10 (Feb. 2, 2000). The GTE court was not fooled by such misrepresentations, and neither should the FCC. *See* Order, No. 97-1859-CIV-T-26C, at 5 (M.D. Fla., Oct. 21, 1999) (“Plaintiffs do not appear to be challenging the reasonableness of the rates or the failure to disclose a particular billing practice, but rather are challenging the reasonableness of the billing practice itself.”).

(iii) [Charges] are ‘rounded up’ to the next minute.”¹⁰

The Commission has ruled unequivocally that as a general matter, charging for non-conversation time, such as whole-minute billing, has “never been found by the Commission to be violative of Section 201(b)”:

We find that these industry practices are not *per se* violative of Section 201(b) of the Communications Act. As Southwestern has pointed out, charging for calls on a whole minute basis “is a simplified method on which to base charges which still reflects general costs” Accordingly, these rate practices are clearly among those which CMRS providers, consistent with Section 201(b) of the Act, have discretion to implement for their services.¹¹

It is notable that no one — including consumer groups and class action attorneys — disputed this fundamental proposition of law before the Commission.¹²

Any other rule of law would disserve the public interest by restricting consumer choice and by inhibiting the ability of competitive carriers to devise service plans designed to meet the needs of their customers. Take, for instance, the matter of per-minute billing (or “rounding up” as class action lawyers like to call it). Per-minute billing has been the standard industry practice since the inception of the mobile services industry nearly 20 years ago.¹³ Nextel began offering per-second billing in 1997,¹⁴ Aerial soon

¹⁰ White FCC Petition at 2. See also Third Amended Complaint at 4 ¶ 14. The *Public Notice* adds a fourth practice — “charging customers for dead time” — although this practice is arguably subsumed within the three practices that the plaintiff/petitioners have specifically raised. The FCC must exercise great care in using the term ‘dead time’ because most of the time that class action attorneys characterize as ‘dead time’ is not ‘dead time’ at all, because the CMRS network is still in use (*e.g.*, setting up or tearing down a call).

¹¹ *SBMS Order*, 14 FCC Rcd at 19904 ¶ 14.

¹² See *id.* at ¶ 13.

¹³ See, *e.g.* *CelCom Communications*, 103 F.C.C.2d 307 (1983); *Cellular Mobile Systems*, CC Docket No. 83-662, FCC 84D-51 (1984). In adopting this practice, the CMRS industry merely followed the lead of the landline toll industry.

followed suit,¹⁵ and shortly thereafter U S WEST Wireless launched its service using six-second (or tenths of minute) billing.¹⁶ Some analysts predicted at the time: “The days of full-minute billing may be numbered.”¹⁷

Notably, both Aerial and U S WEST later stopped using per-second billing, converting to per-minute billing. As U S WEST explained:

“I’m not sure customers really want to see 32 seconds listed on their bill,” Warner says. “It’s more a simplicity question.” Billing in tenths of a minute didn’t matter to U S West customers, she says. “We found out later it wasn’t a high priority.”¹⁸

Subsequent experience with popular “one rate” plans has confirmed that the public has actually demanded just the opposite — more usage per package at lower prices rather than more precise billing increments.

The important point is that in a truly competitive market, carriers should have the flexibility to offer the suite of services and rate structures that best meets consumer needs. CMRS providers possess and exercise this flexibility today — with Nextel continuing to offer per-second billing;¹⁹ Leap offering the other extreme — unlimited local

¹⁴ See, e.g., *Radio Communications Report*, “Nextel Now Offered in 8 New Markets,” at 10 (April 14, 1997)(“The company also offers per-second billing.”); *tele.com*, “Time’s Up for Minute Billing,” at 17 (April 1997)(“Nextel . . . announce[ed] a plan last month to use single-second billing increments — making it the first cellular carrier to do so.”).

¹⁵ See, e.g., *Radio Communications Report*, “Aerial Offering Per-Second Billing,” at 22 (April 14, 1997);

¹⁶ See, e.g., *Billing World*, “AT&T Wireless Case Highlights Practice of Rounding to the Minute” (April 1999)(“U S WEST Wireless . . . originally billed in tenths of a minute when it launched in September, 1997.”).

¹⁷ *tele.com*, “Time’s Up for Minute Billing,” at 17 (April 1997).

¹⁸ *Billing World*, “AT&T Wireless Case Highlights Practice of Rounding to the Minute” (April 1999).

¹⁹ See www.nextel.com/nextelinfo/1secrounding.shtml (“You talked for 2:08 and paid for 3:00 minutes (Perhaps you should spend the next 52 second reading this)”).

usage;²⁰ and most carriers offering a rate structure somewhere in between. (It bears noting that per-second billing does not necessarily result in consumers paying less for service.²¹) The Commission recently commended the CMRS industry for its “innovative pricing plans” because such plans make mobile service more affordable, thereby making the service attractive to a greater number of consumers.²² And based on an extensive rulemaking record, the Commission also recently determined that there is no evidence that “CMRS billing practices fail to provide customers with the clear and non-misleading information they need to make informed choices.”²³

The only effect of a Commission order prohibiting certain rate structures is that consumers would necessarily enjoy fewer options than they enjoy today (because the Commission would effectively require carrier rate structures to look more like each other). Even if one were to assume that the Commission is in a better position than consumers to determine what features and billing options consumers really want and even if the Commission were to further assume that all consumers want the same features, it is not apparent how the public interest can possibly be promoted by restricting consumer choice and by narrowing the differences among the competitors. As the Commission recognized in the context of long-distance service:

[C]arriers compete in terms of their billing practices, and customers are free to select a carrier that offers the most desirable billing options. If the

²⁰ Leap offers an unlimited number of local calls for \$29.95 monthly. See www.cricketcommunications.com. However, Leap customers also pay hefty extra sums for other services such as long distance, voice mail, caller ID, and call waiting.

²¹ A study conducted by the St. Petersburg Times found that Nextel, which offers per-second billing, had the costliest service plan among the seven facilities-based CMRS carriers providing service in the area. See *St. Petersburg Times*, “Tampa, Fla.-Area Cellular Phone Users Face Often Confusing Array of Choices” (Nov. 14, 1998).

²² See *Fifth Annual CMRS Report to Congress*, FCC 00-289, at 16-17 (Aug. 18, 2000).

²³ *Truth-in-Billing and Billing Format*, 14 FCC Rcd 7492, 7501 ¶16 (1999).

Commission were to mandate a particular billing procedure, it would eliminate this form of service competition.²⁴

It finally bears noting any Commission effort to regulate the type of rate structures that CMRS providers may or may not utilize would, in the end, be futile. As the Commission noted in a related context (declining to commence a rulemaking to require toll carriers to use per-second billing), “carriers would almost certainly react by setting their per-second rates at a level designed to recover the revenues that were generated by the previous rates.”²⁵ In fact, new regulations or regulatory prohibitions could easily have the unintended effect of *increasing* overall service prices.²⁶ Such regulations may also have the unintended effect of *increasing* customer confusion and complaints.²⁷

Both Congress and the Commission have determined that “the CMRS industry [should] be governed by the competitive forces of the marketplace, rather than by government regulation.”²⁸ This “hands off” policy for the CMRS industry has been immensely successful:

- In the past two years alone, the number of mobile customers has increased by 56% (from 55 to 86 million), and the number of mobile minutes of use as a percent of total MOUs (including landline) has tripled — from 2.3% in 1997 to 7.1% in 1999.²⁹

²⁴ Letter from Kathleen B. Levitz, Acting Common Carrier Bureau Chief, to Donald L. Pevsner, Esq. (Dec. 2, 1993).

²⁵ Letter from Kathleen B. Levitz, Acting Common Carrier Bureau Chief, to Donald L. Pevsner, Esq. (Dec. 2, 1993).

²⁶ The FCC should not assume that all carriers’ current systems are capable of implementing per-second or other particular rate structure. Any new FCC regulation will likely require many carriers to incur additional costs to modify their systems to accommodate the new regulation.

²⁷ See *Billing World*, “AT&T Wireless Case Highlights Practice of Rounding to the Minute” (April 1999)(article documents how per-second billing could result in apparent discrepancies leading to consumer complaints).

²⁸ See *SBMS Order*, 14 FCC Rcd at 19902 ¶ 9 and n.17.

²⁹ See *Fifth Annual CMRS Report to Congress* FCC 00-289, at 76 and Appendix B, Table 1 (Aug. 18, 2000).

- During the same two-year period, prices for mobile service have fallen by over 30% — while the overall consumer price index and prices for land-line services have increased.³⁰
- Although it is often said that Europe leads the U.S. in the mobile sector, in fact, Americans use their mobile service more than 50% more often than Europeans (221 vs. 145 minutes/monthly).³¹

In this regard, the Council of Economic Advisers has determined that in 1999 alone, the consumer surplus from mobile services was between \$53 and \$111 billion.³²

In summary, the Commission has already determined that each CMRS provider should have the flexibility to use the rate structures and billing practices that it believes best meets the needs of consumers. This determination is supported fully by a public policy analysis. By definition, charges or practices that win acceptance among consumers who are free to choose among several CMRS providers cannot be “unjust” or “unreasonable” within the ambit of Section 201(b) of the Communications Act.³³

³⁰ See *id.* at 4-5 and 20.

³¹ See *id.* at 25.

³² See Council of Economic Advisers, “The Economic Impact of Third-Generation Wireless Technology,” at 6 (Oct. 2000). Consumer surplus is defined as “the difference between the prices consumers actually pay and the maximum amounts they would be willing to pay for a particular good or service.” *Id.*

³³ Completely baseless is the White plaintiff/petitioners’ assertion that GTE violated the Communications Act “because” it allegedly breached its contract with the plaintiffs, and that as a result, the FCC cannot determine whether GTE contravened the Act until it first determines whether GTE breached its contracts. See FCC Petition at 4-5. The FCC has consistently held that it does not have the jurisdiction to adjudicated breach of contract or other state law claims. See, e.g. *Formal Complaints Order*, 12 FCC Rcd 22497, 22589 ¶ 218 (1997)(“[T]he Commission does not have authority to assert pendent jurisdiction over disputes for which no independent jurisdictional ground exists.”); *Poole v. Michiana Metronet*, 15 FCC Rcd 9944, 9947 ¶ 26 (1999) (“The Commission does not have jurisdiction to resolve private contract disputes.”); *MCI*, 10 FCC Rcd 1072, 1074 ¶ 11 (1994)(“[C]ontractual disputes should be resolved by a court of competent jurisdiction, not the FCC.”). Under its authorizing statute, the FCC only has the jurisdiction to entertain claims that arise out of the Communications Act or its implementing rules. See 47 U.S.C. § 208(a); 47 C.F.R. §§ 1.720 *et seq*; *Hi-Tech Furnace Systems v. FCC*, No. 99-1220, 2000 U.S. App. LEXIS 18973 *36 (D.C. Cir., Aug. 8, 2000). More fundamentally, the FCC has *never* held that every breach of contract by a common carrier constitutes an unjust or unreasonable practice under Section 201(b) of the Act. See, e.g., *COMSAT Corp. v. IDB Mobile*, 15 FCC

III. As a Matter of Law, the Failure to Disclose a Business Practice That Is Both Lawful and Common within the Industry Cannot Be an Unreasonable Practice in Contravention of Section 201(b)

The Commission has recognized that practices such as “rounding up” are both lawful under the Communications Act and common within the CMRS industry. If this is the case, there can be no basis for the Commission to conclude that a CMRS provider’s failure to disclose such practices constitutes an “unreasonable” practice violative of Section 201(b).

In *Alicke v. MCI*, 111 F.3d 909 (D.C. Cir. 1997), the class action plaintiffs alleged that MCI engaged in deceptive acts in violation of state law because it did not disclose its “rounding up” practice in its monthly statements. The district court dismissed the lawsuit for failure to state a claim, and the appellate court affirmed, ruling as a matter of law that no reasonable person could possibly have been misled by MCI’s practice:

Because no reasonable customer could actually believe that each and every phone call she made terminated at the end of a full minute, the customer must be aware that MCI charges in full-minute increments only. Accordingly, MCI’s billing practices could not mislead a reasonable customer. *Id.* at 912.

Federal courts in New York have reached the same result. In *Marcus v. AT&T*, 938 F. Supp. 1158 (S.D.N.Y. 1996), the plaintiffs alleged that AT&T’s failure to disclose in advertising and bills its rounding up practice constituted a deceptive practice under the New York Consumer Protection Act. The district court dismissed the complaint on the ground that as a matter of law, AT&T’s failure to disclose the exact duration of the calls on its bills is “not materially misleading because no consumer reasonably could believe

Red 7906 (2000), quoting *COMSAT Corp. v. ICD Mobile*, No. AW 98-281 (D. Md., April 30, 1998)(“[T]his is not an action to vindicate COMSAT’s statutory rights under the [Maritime Satellite] Act — this is a breach of contract case.”).

that a designation of a call in whole minutes accurately reflects the length of that call.” *Id.* at 1174. The Second Circuit affirmed the dismissal of the complaint, holding that the plaintiffs’ state law deception claim is “without merit.” *See* 138 F.3d 46, 63 n.4 and 64 (2d Cir. 1998)(“No reasonable consumer would believe that all of the calls he has ever made with AT&T just happened to last for increments of one minute.”).

These court decisions were made under state law, and the Commission has neither the authority nor expertise to apply state law. However, for the same reasons, the Commission should hold that a carrier’s failure to disclose a lawful and common industry practice does not as a matter of law, constitute an unreasonable practice under Section 201(b) of the Communications Act.³⁴

IV. The Commission Should Advise the GTE Court That the Communications Act Precludes State Law Challenges to the Reasonableness of CMRS Provider Rate Structure Practices

The White plaintiffs raise several state law claims in addition to their federal Section 201 claim. The Commission should advise the GTE court that the Communications Act precludes state law claims challenging the reasonableness of rate structure practices. Such a clarification would be appropriate because the GTE court entered its primary jurisdiction referral order before the Commission released its *SBMS Order* and to provide additional guidance to courts in other jurisdictions.

The Commission has squarely held that Section 332(c)(3) of the Communications Act “bars lawsuits challenging the reasonableness or lawfulness *per se* of the rates *or rate structures* of CMRS providers”:

³⁴ Sprint PCS’ request is limited to the allegations that a carrier failed to disclose its lawful practices. Of course, a carrier’s *affirmative misrepresentation* to consumers of its practices could constitute an unreasonable practice.

States are precluded by Section 332(c)(3)(A) from regulating the “rates charged” by any CMRS provider. . . . [W]e find that the term “rates charged” in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS Accordingly, states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services providers can be subject to charges by CMRS providers.³⁵

Thus, for example, the Commission has ruled it “clear . . . that states do *not* have authority to prohibit CMRS providers from charging for incoming calls or charging in whole minute increments.”³⁶

The California Court of Appeals recently (and independently) reached the identical result. In *Ball v. GTE Mobilnet*, the plaintiffs challenged under state law the same CMRS rate structure practices that the White plaintiff/petitioners challenge here — including, full-minute billing, charging from connection to disconnection (“send” to “end” measurement), and charging for certain unconnected calls.³⁷ The Court of Appeals, in affirming the trial court’s dismissal of these state law claims, held that the plaintiffs “attacked the reasonableness of the method by which the defendants calculate the length and, consequently, the cost of a cellular phone call. As such, the plaintiffs’ claims present a direct challenge to the rates charged by the defendants for cellular phone service”:

[T]he gravamen of plaintiffs’ complaint . . . is that the defendants’ actions have resulted “in subscribers, including plaintiffs, being *overcharged for service*.” From this description, it is clear that plaintiffs challenge *the rates charged* by defendants. . . . We conclude that section 332(c)(3)(A)

³⁵ *SBMS Order*, 14 FCC Rcd at 19901 ¶ 7 and 19906-07 ¶¶ 19-20 (1999)(emphasis added).

³⁶ *Id.* at 19908 ¶ 23 (emphasis added). See also *Wireless Consumer Alliance*, WT Docket No. 99-263, FCC 00-292, at ¶ 13 (Aug. 14, 2000)(“Section 332(c)(3)(A) bars state regulation of, and thus lawsuits regulating, the entry of or the rates or rate structures of CMRS providers.”); *id.* at ¶ 8 (“[U]nder Section 332 states do not have authority to prohibit CMRS carriers from charging in whole minute increments or charging for incoming calls.”).

³⁷ See *Ball v. GTE Mobilnet*, 81 Cal. App. 4th 529, 535-36 (June 8, 2000), *modified on other grounds on rehearing*, 81 Cal. App. 4th 1204 (July 6, 2000).

preempts the plaintiffs' claims to the extent that plaintiffs challenge the defendants charging for non-communications time, including rounding-up
...³⁸

Like the Commission, the Court held that Section 332(c)(3) “only preempts a state law action challenging the reasonableness or legality of the particular rate or rate practice itself,” and that this statute does “not preempt a plaintiff from maintaining a state law action in state court for an alleged *failure to disclose* a particular rate or rate practice.”³⁹ The Court remanded the “failure to disclose” claims because of the “possibility that plaintiffs can allege state law causes of action based on inadequate disclosure of non-communications time charges” and because of the possibility that a “sufficient remedy” as part of such a limited action may exist, namely, “injunctive relief.”⁴⁰

Although federal law prohibits all state law challenges to the rate structure used by a particular CMRS provider, it bears noting that this result is also dictated by commercial realities. Mobile services, “by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.”⁴¹ The mobile nature of CMRS thus makes compliance with varying state regulations particularly difficult. For example, it is common for a mobile switching center (“MSC”) to be located in D.C., but serve customers located in D.C., Maryland, and Virginia. Assume each jurisdiction adopted different billing measurement requirements (*e.g.*, D.C. - per-second billing; Maryland – six-second billing; Virginia – per-minute billing). How could a CMRS pro-

³⁸ *Id.* at 537-38 and 540-41 (emphasis in original). The Court did hold that the plaintiffs could pursue their “reasonableness” claims prior to August 7, 1995, the date that Section 332(c)(3)(A) took effect in California. *See id.* at 541.

³⁹ *Id.* at 543 (emphasis in original).

⁴⁰ *Id.* at 543.

⁴¹ H.R. Rep. No. 103-111 at 259-60 (1993).

vider possibly determine the appropriate measurement to use with a given call?⁴² What measurement should the carrier use for a customer making a single call while traveling through all three jurisdictions? What measurement would apply to travelers or roamers in the D.C. metropolitan area? In addition to the increased administrative costs for providers (which would be reflected in higher costs to consumers), customer confusion would ultimately result from billing potentially subject to myriad regulations of different jurisdictions.

But the situation proposed by the White plaintiff/petitioners is actually much worse. Class action lawyers would have *each jury* to decide whether or not a particular CMRS rate structure is reasonable. Thus, under the White plaintiff/petitioners' vision for the industry, CMRS providers could face incompatible measurement requirements not only between different states but also within the same state — and potentially, within the same metropolitan area (if different juries reach different results).⁴³

Congress amended Section 332 for a specific reason: “to establish a Federal regulatory framework to govern the offering of all commercial mobile services.”⁴⁴ Congress achieved this objective by prohibiting states from regulating the rates charged by

⁴² Reference to the serving base station, or cell site, does not help because a base station may serve customers in multiple states.

⁴³ Indeed, a jury involving one carrier may reach a result different than a different jury addressing the same practice in the same jurisdiction involving a different carrier, skewing competition in the marketplace. This fear is not unfounded. *See Comcast Cellular Telecommunications Litigation*, 949 F. Supp. 1193, 1204 (E.D. Pa. 1996) (Same class action attorneys filed identical lawsuits in Pennsylvania, Delaware and New Jersey, “creating the potential for three radically different determinations of Comast’s obligations to its customers regarding its rates and billing practices.”).

⁴⁴ H.R. Conf. Rep. No. 103-213, at 490 (1993). *See also id.* at 481 (“[B]ecause state regulation can be a barrier to the development of competition in this [CMRS] market, uniform national policy is necessary and in the public interest.”).

CMRS providers.⁴⁵ Both the Commission and the courts have correctly held that the “distinction between rate and time is nonsensical”:

A rate for a service . . . that is sold based on the length of time that it is used necessarily includes a method of measuring that time, as well as a price for each unit of time used; in short, the length of time for which a customer is charged is an inseparable component of the rate. . . . In the context of cellular service, the element of time can no more be divorced from rate than a clock from its hands.⁴⁶

For all the foregoing reasons, the Commission should remind the GTE court (and other courts) that while the Communications Act may not preclude a plaintiff from raising state law “failure to disclose” claims against a CMRS provider, the Act does preclude the use of state law from challenging the reasonableness of a provider’s rate structure.

V. Conclusion

Both Congress and the Commission have determined that “the CMRS industry [should] be governed by the competitive forces of the marketplace, rather than by government regulation.”⁴⁷ The market for commercial mobile radio services has become fiercely competitive. For example, in the Tampa/St. Petersburg metropolitan area where the plaintiff/petitioners reside, consumers have a choice among *seven different* facilities-based CMRS providers.

The plaintiffs and their attorneys obviously want to make a buck or two (actually, thousands or millions of dollars) by hoping the Commission will restrict the choices that

⁴⁵ See 47 U.S.C. § 332(c)(3)(A).

⁴⁶ *Ball v. GTE Mobilnet*, 81 Cal. App. 4th at 538. See also *SBMS Order*, 14 FCC Rcd at 19906 ¶ 19, quoting *AT&T v. Central Office Telephone*, 524 U.S. 214 (1998) (“Rates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached.”).

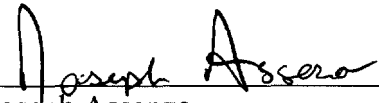

⁴⁷ *SBMS Order*, 14 FCC Rcd at 19902 ¶ 9 and n.17. See also *SMR Systems*, 12 FCC Rcd 9972, 9980 ¶ 22 (1997) (“Market forces — not regulation — should shape the CMRS marketplace.”).

carriers may lawfully offer to American consumer. This effort may make sense from the perspective of the plaintiffs' and their attorneys' pocketbooks, but the plaintiffs have yet to explain how government restriction of consumer choice promotes the *public* interest.

Respectfully submitted

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October 20, 2000

CERTIFICATE OF SERVICE

I, Anthony Traini, hereby certify on that on this 20th day of October 2000, I served a copy of the foregoing Sprint PCS Comments by U.S. first-class mail, or by hand delivery as indicated with an *, to the following persons:

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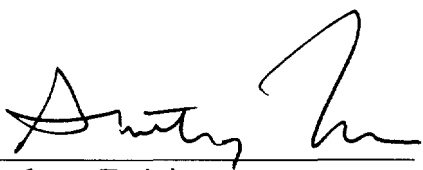
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